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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

RICHARD HENRY GORANOWSKI -- PETITIONER

VS.

UNITED STATES EDUCATION DEPARTMENT

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard Henry Goranowski
5440 Cass Avenue, Suite 710
Detroit, Michigan 48202
(313) 833-5068

4/PP

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QUESTIONS PRESENTED

1. (I) Where the Fourth and Eleventh Circuit are split over the instant cause and Olavarrieta (*infra)* as to whether violation of regulations promulgated under the Higher Education Act of 1965, as amended, can be Federal Rule 9(b) private causes of action, as in Bivens (*infra)*?

   (II) Does a student loan defaulter have any right to offer defenses in federal tort or contract particularizing repudiations of U.S.Code or C.F.R. stipulations by the U.S. Education Department as a party, in the federal district courts to counter collections attempts on a loan declared in default?

2. Whether, under the 'Clear and Present Danger' doctrine, a failure to publish a U.S. appellate denial of law elsewhere upheld, as in Olavarrieta and Bivens, *supra, infra*, by the Federal Circuit and the U.S., obstructs justice by constituting, as in Landmark, and Gutierrez, *infra*, *de jure* obstruction of Fifth and Fourteenth Amendment rights to due process?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

RICHARD HENRY GORANOWSKI.

Respondent:

UNITED STATES DEPARTMENT OF EDUCATION.

Original parties dismissed, with prejudice, on Petitioner-Plaintiff's motion, by the federal court of first instance are:

HIGHER EDUCATION ASSISTANCE FUND,
WACHOVIA FINANCIAL SERVICES; and
ANTIOCH UNIVERSITY.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

INDEX TO APPENDICES iv

TABLE OF CITATIONS vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. JURISDICTION BELOW 2

B. RELEVANT FACTS 3

REASONS FOR GRANTING THE WRIT 6

I. THE LOWER COURTS ARE SPLIT OVER WHETHER A VIOLATION OF THE HIGHER EDUCATION ACT OF 1965 CONSTITUTES A PRIVATE RULE 9(b) CAUSE OF ACTION 6

II. TO AFFIRM A STUDENT'S RIGHT TO OFFER CONTRACT DEFENSES ON GSL LOAN DEFAULTS . . . 14

III. THE FOURTH CIRCUIT *DE JURE* OBSTRUCTS JUSTICE BY REFUSING TO PUBLISH OPINION THAT FAILS TO CONFORM TO LAW OR FACT 18

CONCLUSION 27

INDEX TO APPENDICES

APPENDIX A:

4th Circuit Mandate, No.94-2527 entered January 24, 1996; 4th Circuit *en banc* Opinion No.94-2527 (unpublished) entered January 16, 1996 ..... **A(1) page 1**

4th Circuit Opinion No.94-2527 (unpublished) entered November 15, 1996 .... **A(2) page 1**

APPENDIX B

E.D.Va. Order (unpublished) entered October 14, 1994, denying Plaintiff's Motion to Amend Judgment; hearing transcript of October 14, 1994 ..... **B(1) page 1**

E.D.Va. Order (unpublished) entered September 2, 1994, granting summary judgment to Defendant-Counterclaimant, U.S. Department of Justice; hearing transcript of September 2, 1994 ..... **B(2) page 1**

Defendant U.S. Response to Plaintiff's Affidavit Opposing Defendant's Motion for Summary Judgment ..... **B(3) page 1**

E.D.Va. Order (unpublished) dismissing Plaintiff's fraud count against Defendant; dismissing Plaintiff's motion for default judgment against Defendant; dismissing Plaintiff's motion to strike Defendant's counterclaims; entered July 15, 1994, and envelope mailed by the court containing said disposition addressed to plaintiff, postmarked August 2, 1994 ..... **B(4) page 1**

APPENDIX C

"Declaration of Martha Windsor"
(U.S. Statement of Facts pursuant to
Motion for Summary Judgment) . . . . . **C page 1**

APPENDIX D

Qui Tam "Relator's Statement of Material
Evidence and Information" . . . . . **D page 1**

APPENDIX E

"Affidavit Opposing Defendant's Motion
for Summary Judgment" . . . . . **E page 1**

APPENDIX F

"Affidavit in Response to the U.S. Attorney's
Suggestion of Dismissal . . . . . **F page 1**

APPENDIX G

Order denying Plaintiff's motion for
reconsideration; denying Plaintiff's motion
to amend complaint, entered January 10, 1989
(U.S.D.C.Dist.Col., C.A.88-0404); Plaintiff's
motion to reconsider and to argue orally . . . . . **G page 1**

APPENDIX H

Plaintiff's motion for partial summary judgment
and motion to refer to Master -- Non-Jury case.
May 6, 1988 (U.S.D.D.C.C.A.88-0404) . . . . . **H page 1**

TABLE OF AUTHORITIES CITED

CASES **PAGE NUMBER**

Federal District:

De Jesus Chavez v. LTV Aerospace Corp.,
412 F.Supp 4 (N.D.Tex.1976) 8

Goranowski v. Antioch School of Law, et al.,
D.C.D.C. Civ.No.404 (1988) 5

Hudson v. Academy of Court Reporting, Inc.,
746 F.Supp 717 (S.D.Oh.1990) 8

Jackson v. Washington School of Culinary Arts,
788 F.Supp 1233 (D.D.C.1992) 24

Krams v. Tempe Technical Institute, Inc.,
807 F.Supp 569 8

Moy v. Adelphi Institutes, Inc.,
866 F.Supp 696 (E.D.NY 1994) 7

St. Mary of the Plains College v.
Higher Education Loan Program of Kansas,
724 F.Supp 803 (D.Kan., 1989);
Graham, 125 F.R.D. at 687 9

Tipton v. Secretary of Education,
768 F.Supp 540, 544 (S.D.W.Va.1991) 13

U.S. v. Davis, 817 F.Supp 926 (M.D.Ala.1993) 7

Federal Circuit:

Jackson, et al. v. Culinary School of Washington, Ltd., 27 F3d 573 (D.C.Cir.1994) 14

U.S. v. Olavarrieta, 812 F.2d 640 (11th Cir.1987) *per curiam; cert. den.* 484 U.S. 1851, 108 S.Ct.152, 98 L.Ed.2d 107 (1987) 6

U.S. *ex rel.*, Joseph v. Cannon, 642 F.2d 1373 (D.C.Cir.1981); *cert.den.*, 455 UI.S. 999; 102 S.Ct 1630; 21 L.Ed.2d 865 (1982) 12

L'Ggrke v. Benkula, F.2d 1346 (10th Cir. 1992) 12

Windsor U. v. Secretary, HEW (C.A. Cal 1976) 550 F.2d 1203) 23

U.S. Supreme Court:

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 394-395, 91 S.Ct. 1999, 2003-04, 29 L.Ed.2d 719 (1971) 10

Cannon v. University of Chicago, 441 U.S. 677, 688, 99 S.Ct.1946, 1953, 60 L.Ed.2d 560 (1979) 10

Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975) 8

Gutierrez de Martinez, et al, v. LaMagno (No.94-167, June 14, 1995) 22

Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 56 L.Ed.2d 1, 98 S.Ct 1535 (1978) 20

STATUTES AND RULES

Racketeer-Influenced or Corrupt Organizations, 18 U.S.C. Section 1961, *et seq.* 5

Higher Education Act, 20 U.S.C. Section 1071, *et seq.* 16

Judiciary Act, 28 U.S.C. Section 1291 3

Judiciary Act, 28 U.S.C. Section 1254(1). 1

28 U.S.C. Section 2415 16

False Claims Act, 31 U.S.C. Section 3730, *et seq.* 2

Truth In Lending Act, 15 U.S.C. 1601, *et seq.* 12

34 C.F.R. Section 682.207 (1993), "Due diligence in disbursing a loan" 1

Federal Rule of Civil Procedure 9(b) "Fraud, mistake, condition of the mind" 10

United States Constitution Article III 16

U.S. Constitutional Amendments I, V, VI, and XIV 19

OTHER AUTHORITIES

Judicial Canons I and II 18

"Longstanding Management Problems Hamper Reform" Government Accounting Office ("GAO") Report, May 28, 1993, ... 3

"Financial Audit: Guaranteed Student Loan Program's Internal Controls and Structure Need Improvement," (GAO/AFMD-93-20, March 16, 1993) 4

Phillip Joy, "Unpublished Opinions Stunt Common Law," *National Law Journal*, January 26, 1996 19

James Madison, *The Federalist* No.10, p.79 (C.Rossitter, ed.1961) 21

Daniel R. Levine, *Reader's Digest*, "The Student-Aid Swindle," January 1995 3

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was January 24, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). A 60-day extension was granted by the Clerk of the Supreme Court on April 17, 1996.

STATUTORY PROVISIONS INVOLVED

34 C.F.R. Section 682.207 (1993), "Due diligence in disbursing a loan"

(d)(1) Unless prohibited by the guaranty agency, a lender may disburse loan proceeds after the student has ceased to be enrolled on at least a half-time basis or after the expiration date of the period of enrollment for which the loan was intended, in accordance with paragraphs (d)(2) and (3) of this section.

(2) A disbursement described in paragraph (d)(1) of this section may be made --

(i)(A) Only if the loan proceeds will be used to cover documented educational charges to the student that are normally included in a borrower's cost of attendance under section 472 of the Act for a period of enrollment for which the loan was intended and during which the student was actually enrolled on at least a half-time basis.

34 C.F.R. Section 682.604 (1993) "Processing the borrower's loan proceeds and counseling borrowers"

(d)(3) If a lender makes a disbursement after the earlier of the dates set forth in paragraph (e)(1) of this section and the lender or guaranty agency has informed the school that it prohibits a late disbursement as permitted by 682.207 (d)(2), the school shall return the loan proceeds to the lender within 30 days after its determination that one of the conditions described in paragraph (e)(1) of this section exists. The school shall send a notice to the lender with the loan proceeds informing the lender as to which of the conditions described in paragraph (e)(1) of this section exist.

34 C.F.R. Section 682.604(d)(4) If a registered student withdraws or is expelled prior to the first day of classes of the period of enrollment for which the loan is made or fails to attend school during that period, or if the school is unable for any other reason to document that the student attended school during that period, the school within 30 days of the period described in [section] 692.607(c) shall notify the lender of the student's withdrawal, expulsion, or failure to attend school, if applicable and return to the lender--(i) Any loan proceeds credited directly to the student's account....

STATEMENT OF THE CASE

A. JURISDICTION BELOW

U.S.-related claims for damages were filed by Richard H. Goranowski (hereinafter, "Petitioner"), based on citizenship in the Eastern District of Virginia on November 3, 1993, under seal, as a *qui tam* action under the False Claims Act, 31 U.S.C. Section

3730, *et seq*. The U.S. Attorney, after two 60-day *ex parte* extensions, suggested dismissal, but the claim was stayed by the lower court.

Petitioner moved to remove original defendant parties under seal and to amend his complaint as a matter of right as a Rule 9 civil suit particularized by his Relator's Statement of Fact, to add Defendant United States Department of Education for failure to oversee. Judge Bryan never removed the suit as a False Claims Act file, but the clerk changed the case number. As a result, the U.S. Defendant misunderstood, despite having been properly served, and Petitioner filed a default motion against the Education Department, but the lower court allowed a late answer. Three months later, the lower court granted summary judgment on the U.S. motion, and then denied Petitioner's motion for rehearing.

Appellate jurisdiction was involved pursuant to 28 U.S.C. Section 1291.

B. RELEVANT FACTS

According to the General Accounting Office ("GAO"), the research and investigative arm of Congress,

> deplored the [Education] department's "impaired capacity to manage" [GAO May 28, 1993, Report] and said it lacked information and resources to

> ensure against waste and fraud. The department's student-loan files are in such disarray that the GAO has been unable to audit them.

Levine, Daniel R. "The Student-Aid Swindle," *Reader's Digest*, January 1995, page 95. *See also*, "Fiscal Year 1990 Financial Audit Attempted of the Guaranteed Student Loan Programs," (GAO)/AFMD-91-.4, Sept.1991) (emphasis added) *in GAO May 1993 Report to the Secretary of the U.S.Education Department.*

Petitioner was a law student at Antioch School of Law[1], which closed its doors in 1988, when Petitioner's class was to graduate. Petitioner was advised in April 1985 by the registrar that Petitioner had not applied for enough student loan money and was $3,000 in arrears. The registrar demanded immediate payment, threatening he "not be permitted to sit for final exams." Appendix D page 9. The financial aids advisor in charge of Petitioner's loan portfolio, however, was off on pregnancy leave and no replacement was made. Petitioner was thus prevented from writing exams and consequently received a failing mark in every course he enrolled in. Petitioner was advised retroactively by the financial aids advisor, back from leave, that he was entitled to monies under 34 C.F.R. Section 682.207 and

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[1] The 'little red law school;' 'the little law school that could,' endorsed by Justice William O. Douglas and Ralph Nader, Esq., that was founded in 1973; went defunct in 1988.

Petitioner signed the new loan contract and executed the first loan installment when it was issued in late August 1986. Appendix D page 10. Then the registrar demanded that Petitioner register for classes as an illegal precondition under 682.207 to accepting further proceeds of the loan -- and having his exams for the previous semester read. Petitioner declined to register for more classes (and more federally guaranteed loans!) offered with fraudulent intent. The loan advisor in obvious retaliation but in absolute controversion of 34 C.F.R. Section 682.207 (yet attempting to justify under color of 682.604) returned the second installment of Petitioner's recently applied-for loan to the lender, absent any 682.604(c) or (d) demand for any such action by said lender. Appendix D page 15.

Petitioner pointed to the law but was snidely advised "If anybody's going to jail, you are;" then further advised that he had "Been separated for failure to register for Fall 1986. Effective date 5/2/86." Appendix D page 14.

Plaintiff filed suit in U.S. District Court for the District of Columbia in November 1987 as a treble-damage Racketeer-Influenced or Criminal Organizations Act, 31 U.S.C. Section 1961, *et seq.*, civil claim in Goranowski v. Antioch School of Law, *et al.*, C.A.88-0404(1988), but after 13 months' pendency was dismissed (Appendix G page 1) with Petitioner's original *qui tam*, which the U.S. Attorney moved be set aside (Appendix G page 2).

Petitioner filed a subsequent *qui tam* action in November 1993 (later amending to a Rule 9(b) fraud complaint against the U.S.), in response to collection demand letters from the U.S. Education Department in April 1993.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS ARE SPLIT OVER WHETHER A VIOLATION OF THE HIGHER EDUCATION ACT OF 1965 CONSTITUTES A PRIVATE RULE 9(b) CAUSE OF ACTION

The lower court, dismissing Petitioner's Complaint, stated:

> The plaintiff, apparently in default on various loans he obtained while a student and apparently feeling that the best defense is a good offense, originally brought this case as a *qui tam* action against the United States Department of Education and three other defendants. Failing in that endeavor, the plaintiff filed an amended complaint asserting a cause of action under Rule 9(b)....
>
> .... The court finds the suggestion of dismissal is well-taken. **Rule 9(b) does not create a private right of action[.]**

Appendix B(4) page 1 (emphasis added). Petitioner did no *jeofails. Id.* The "suggestion of dismissal," however "well-taken," ignored the *qui tam* Relator's Statement (Appendix D), adhering as F.R.C.P. Rule 9(b) "particularity," and denied Petitioner's contract interests where U.S. Education was loan subrogor.

The Fourth Circuit, affirming Goranowski, reverses U.S. v. Olavarrieta, 812 F.2d 640 (11th Cir.) *per cur.cert. den.*, 484 U.S.851, 108 S.Ct.152, 98 L.Ed.2d 107 (1987):

> The court did not hold that the defendant could not raise these school-related defenses against the government. In fact, the district court stated that the proper way for the defendant to pursue his defenses was to make them "against the government, not the school" [Olavarrieta, *id.*]

U.S. v. Davis, 817 F.Supp 926, 928 (M.D.Ala.1993) (*in* Appendix E page 5). The Fourth Circuit affirmed without comment, oral argument or publication the Eastern District on November 14, 1995 (Appendix A(2)); and then declined to rehear *en banc* (Appendix A(1), as on January 24, 1996, underwriting the trial court and the U.S. Attorney's contention (1) that Petitioner had no Rule 9(b) cause of action; (2) Petitioner had no U.S. statutory defenses or claims under contract or tort law.[2]

The Fourth Circuit finding herein is in further conflict with contemporary federal case law, which allowed a plaintiff's Rule

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[2] Davis also points to the 1991 amendment to the Higher Education Act which removed the 28 U.S.C. 2415 six-year statute of limitation on collections by the U.S. of outstanding debts, tolling *ex post facto* U.S. claims on loan defaulters whose six-year period ended before 1991.

In the 1985 amendments to the Higher Education Act, Congress rescinded Truth In Lending Act protection from coverage of student loan borrowers.

9(b) complaint of fraud on a student loan; and also sufficient cause of action to allow a RICO claim to survive a motion to dismiss in Moy v. Adelphi Institutes, Inc., 866 F.Supp 696 (E.D.NY 1994).[3] Where Petitioner argued that amendment of his *qui tam* action to a Rule 9(b) complaint was necessary to keep his *qui tam* issues in court, the lower court kept the case pendent only to prejudicially encumber Petitioner with a final judgment. The lower court was inchoate[4] as to its threshold finding why "Rule 9(b) does not create a private cause of action," though it apparently relies on Hudson v. Academy of Court Reporting, Inc., 746 F.Supp 717 (S.D.Oh.1990), L'Ggrke v. Benkula, F.2d 1346 (10th Cir.1992), and Krams v. Tempe Technical Institute, Inc., 807 F.Supp 569. This slate of cases each distinguish the ruling

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[3] Moy is further analogous to the precursor to Petitioner's certiorari case, Goranowski v. Antioch, et al. (*id.*,), civil RICO matter, which dismissed after Petitioner noted previous "state" (District of Columbia Superior) bench-related ties with defendant law school and asked the judge to recuse. See, Appendix G.

[4] *See infra*, Section III. Petitioner complained verbally to the U.S. Magistrate that he had not been noticed by the court of the July 15, 1995, dispositive order, until well after the two week closure on interlocutory motions practice had run, with entry on July 15, 1994 (*see*, Appendix C(3)B; *see also*, Appen-dix B p.10 letter postmarked "Aug. 2, 1994"). Accordingly, Chief Judge Cacheris took over from Senior Judge Bryan.

in De Jesus Chavez v. LTV Aerospace Corp., 412 F.Supp 4 (N.D.Tex.1976), applying Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975)[5] **but none overturn De Jesus Chavez:**

> Considering these factors in the light of the presumption against the creation of implied rights, the court concludes that the Higher Education Act neither expressly nor impliedly provides plaintiffs with a private right of action. While basing its decision on the above analysis, the court notes that its holding is in agreement with the majority of district courts that have addressed this issue. *See, e.g.,* Hudson v. Academy of Court Reporting, [*id.*], St. Mary of the Plains College v. Higher Education Loan Program of Kansas, 724 F.Supp 803 (D.Kan., 1989); Graham, 125 F.R.D. at 687. ***But see*** **De Jesus Chavez v. LTV Aerospace Corp.** [*id.supra.*] [Emphasis added.]

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[5] In determining whether a private remedy is implicit in a statute ... several factors are relevant. [1] Is the plaintiff "one of the class for whose especial benefit the statute was enacted .... [2] Is there any indication of legislative intent, explicit or im-plicit, either to create such a remedy or to deny one.... [3] Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff.... [4] Is the cause of action one traditionally relegated to state law... that would be in-appropriate to infer a cause of action based solely on federal law? Cort v. Ash (id. at 78, 95 S.C.t. at 2088) *in* Hudson v. Academy of Court Reporting, Inc., 746 F.Supp 718, 719 (S.D.Oh.1990).

Keams, *id.supra*, at 580. See, also, Appendix E p.5. Petitioner noticed for the lower court that De Jesus Chavez was still good Fifth Circuit law (Appendix E page 5), and later in his appeal brief, thus representing the substantial schism case law before the Fourth Circuit. Moy, *supra*, decided over a year later, straddles the nature of the split brought here for *Certiorari*. Moreover, where "The test provided for in Cort must pro-vide said implied private cause of action in the absence of an expressed statutory right" (Hudson, *id.* at 719), is precisely Petitioner's aim from the outset in styling his amended complaint with the U.S. the sole contract/tort defendant:

> It is clear that merely because a federal statute has been violated and some person or entity is harmed does not necessarily mean that a private cause of action exists.... *See., e.g.*, Cannon v. University of Chicago, 441 U.S. 677, 688, 99 S.Ct.1946, 1953, 60 L.Ed.2d 560 (1979). The test provided for in Cort must provide said implied private cause of action in the absence of an expressed statutory right. As such, the four factors are not granted equal weight, as the second and third factors are traditionally more heavily relied upon on deciding whether to infer a private cause of action.

Hudson, *id.* at 719. Petitioner, as did the Hudson plaintiff and the Cort Court, cited Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 394-395, 91 S.Ct. 1999, 2003-04, 29 L.Ed.2d 719 (1971), as allowing common law 9(b) causes of action against the U.S., which is precisely what the Hudson

court, as well as the Fourth Circuit herein, disavows. Appendix E page 5. Important as equity in this matter for Certoirari is *dictum* here in direct contravention of 34 C.F.R. 682.604(c)[6]:

> The issue is whether [Petitioner] applied for and received loans to attend the 1986 fall session and failed to return to Antioch. This is undisputed, and the responsibility for this failure rests with the plaintiff....

Appendix B(2) pages 13 and 14. The lower court declares that Petitioner had neither a private cause of action nor contract defenses on his loan, despite having been expelled. *Id., supra:*

> THE COURT: Okay. I understand your argument. I'll grant your pleadings. I considered it when I ruled on this case initially. I don't find anything to change my opinion in this case on the basis of your new submission.

Appendix B(1) p.9.

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[6] Chief Judge Cacheris took over from Senior Judge Bryan and, without blinking and eye, ignored facts alluding to the text of 34 C.F.R. 682.604(c), ordering summary judgment for cross-claim defendant, U.S. Education Department. Where the U.S. Attorney in its Statement of Facts represented falsely that Petitioner had of his own choosing failed to register for school, Petitioner had, in fact, been expelled in May 1986 ("Been separated for failure to register for Fall 1986, ***effective date 5/2/86,***" Appendix D page 14, (emphasis added)) for failure to pay tuition and prevented, for having refused to register as a pre-condition to accept the second disbursement of his loan, and was persona non gratia, barred from the school premises in Fall 1986.

The lower court "best defense is a good offense" finding, *id., supra*, Appendix B(4), is Hudson:

> The plaintiff filed the Complaint alleging the failure to return the loan proceeds as a violation of 34 C.F.R. 682.604(d), thus providing federal jurisdiction.... For purposes of this motion the only issue before this Court is whether plaintiff, a private individual, has standing to bring the suit in this Court.

Hudson, *id.* at 719.

Petitioner, however, arguing Bivens, in support of his right to a common law Rule 9(b) complaint, further argued U.S. *ex rel.*, Joseph v. Cannon, 642 F.2d 1373 (D.C.Cir. 1981) *cert.den.*, 455 Ul.S. 999; 102 S.Ct 1630; 21 L.Ed. 2d 865 (1982):

> because 'fraud' encompasses a wide variety of activities, [and] the requirements of Rule 9(b) guarantee all defendants sufficient information to allow for preparation of a response [note omitted].

Joseph, *ex rel.*, id. Petitioner argued Joseph, *ex rel.*

> Thus, a "clear and concise" Rule 8 statement of 'mistake' here is not compromised by reducing the elements of the case to the language of a 9(b) complaint, the problem herein being to tailor the complaint sufficient to rebut the various U.S. immunity and subject matter defenses anticipated [note 1 omitted] Where [Joseph] *ex rel.*, heard on appeal the U.S. declined (as it does in this pendant matter, was *a fortiori* decided on grounds sounding in 9(b) tort, the amended complaint here discerns that, as the U.S. has repeatedly suggested, a *qui*

> *tam* action must fail because "a False Claims Act suit against the ED [may] not satisfy the case or controversy requirement of Article III of the Constitution" U.S. June 13, 1994, Memorandum [in support of suggestion of dismissal] at 4.

Appendix F page 1 and 2. Petitioner moved to strike the False Claims Act Defendants because of Olavarrieta, redundance, and because the trend of the lower courts had been to find:

> no clear basis upon which to conclude that, by encouraging maximum lender participation in the GSLP, Congress intended for lenders with a close connection to a participating school to be absolutely shielded from liability when a student's loan obligation has been tainted by misconduct on the part of that school sufficient to adversely affect the enforceability of the student's loan.

Tipton v. Secretary of Education, 768 F.Supp 540, 544 (S.D.W.Va. 1991).[7] Petitioner arguably thereby insulated his complaint from the second and third 'political' and "legislative intent" prongs of the Cort test, "the four factors are not granted equal weight, as the second and third factors are traditionally more heavily relied upon on deciding whether to infer a private cause of action" (L'Ggrke, *id.*at 1347), and along the Rule 9(b) lines of *any qui tam* action in Joseph, ex rel.

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[7] See also, Olivarrieta, *supra*. Petitioner noted for the lower court that the Tipton defendant, Wachovia Financial Services, was also a defendant in the original *qui tam* action herein. Appendix B(2) page 7.

II. TO AFFIRM A STUDENT'S RIGHT TO OFFER U.S. CONTRACT DEFENSES ON GSL LOAN DEFAULTS

A student's right to offer contract defenses in the face of a charge of default on a guaranteed student loan ("GSL") is *gravamen* here and in the D.C. Circuit decision[8] in Jackson v. Culinary School of Washington, Ltd., 27 F3d 573 (D.C.Cir.1994):

> All of the parties to this case agree that appellants have valid claims sounding in fraud and breach of contract against the Culinary School, which is now apparently judgment-proof. This case asks us to determine to what extent these claims may be asserted as defenses against collection by third-party lenders and their assignees.

id., page 174. The Court of Appeals for the District of Columbia further found, "Reviewing courts must exercise independent

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[8] Petitioner's pertinent claim against the Education Depar-tment was in contract (9(b) "mistake"), where the U.S. agency has a duty to oversee disbursement of student loan funds, a duty affirmed in Windsor U. v Secretary, 550 F.2d 1203 (1976) *infra*. Petitioner lodged no state claims, instead alleging activities that broke U.S. law at 34 C.F.R. 682.207 and 682.604, which Judge Richey held in Jackson were contract provisions to be honored. Petitioner's Relator Statement (Appendix F) on its face is hard evidence of the Education Department's contractual neglect; moreover, the GAO 1993 finding that ED GSL files were "unauditable" **speak to the justiciable contract necessity of generally accepted accounting principles, lacking which are arguably grounds for contract voidance, even with the U.S.**

judgment in evaluating propriety of granting declaratory relief," Headnote 1, *id.*, page 573, concluding:

> [W]e pass over the opportunity to render declaratory relief as to appellants' state-based claims at this juncture. As to the sole federal claim, we affirm the district court's result but do so on different grounds, resting on the conclusion that the Secretary of Education's origination policy did not confer an enforceable right on appellants.

Jackson, *id.* Thus, U.S. District Courts[9] have, by accretion of case law (but heretofore without affirmation from a higher court), abided that congressional intent has consolidated against student loan defaulters in all cases and at all costs, divesting such a class of loan recipients with no private cause of action. **The class of student loan recipients whose causes of action are justiciable as in prong one of the Cort v. Ash test, *id.*, is numerous, where it has been demonstrated that an attempted 1990 GAO audit was**

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[9] Judge Richey's massive opinion in Jackson, *et al.* v. Washington School of Culinary Arts, 877 F.Supp 1233, (1992) treats the U.S. as a necessary party to a contract where contract defenses are allowable, meaningfully quoting Farnsworth on Contract 11.8 at 106 (1990). The D.C. Circuit ignored Judge Richey's impressive treatment and affirmed "the district court's result but do so on different grounds...." Is the conclusion to be readily affirmed here by the silence of the High Court that the U.S. can walk away from a contract? Certainly, historical precedents abound: *see*, Bureau of Indian Affairs v. Geronimo.

impossible, due to mismanagement and record disarray. *See, id.*, "Fiscal Year 1990 Financial Audit Attempt...." *See also*, "Financial Audit: Guaranteed Student Loan Program's Internal Controls and Structure need Improvement" (GAO/AFMD-93-20, 3/16/93). Thus, "congressional intent" in light of GAO findings is still something:

> [the] court must consider if implying a remedy for borrowers is consistent with the underlying purpose of the legislative scheme. The specific purpose of the [Higher Education] Act are to encourage lenders to make student loans, to provide student loans for students.... 20 U.S.C. 1071(a)(1), see also 34 C.F.R. 682.100 (1990). Allowing student borrowers to sue lenders and accrediting agencies likely will not further these specific purposes.

Keams v. Tempe Technical Institute, Inc., 807 F.Supp 569, 579 (D.Ariz.1992). The Keams plaintiff, was criticized, however:

> Rather than providing references to the Higher Education Act or legislative history implying a private cause of action, plaintiff argues that the court should find a private cause of action because the Act lacks effective administrative remedies for the protected student class. *See* Cannon v. University of Chicago, 441, U.S. 677, 706 n.41, 99 S.Ct 1946, 1962-63 n.41, 60 L.Ed.2d 560 (1979).

id. Student loan recipients are at the bottom of the federal loan guarantee food chain. In 1985 Truth in Lending Act provisions

were removed; in 1991, the six-year statute of limitation on U.S. Government collection activities was ended on student loans. U.S. District Courts have taken up the shield of "legislative intent" in the Higher Education Act to justify collections to cover up an outright government taking. In comparison with Savings and Loan "bailouts" with federal dollars, student loan recipients enjoy substantially less rights than garden-variety S&L borrowers and are cast unaccountably into a class of indentured servitude denied rights to due process as effectively as was Dredd Scott.

In the case at-bar, Petitioner initially provided references to Olavarrieta and De Jesus Chavez in arguing for a Rule 9(b) claim against the United States Government when the U.S. Attorney abrogated its responsibility to prosecute wrongdoing on the basis of Petitioner's *qui tam* Relator Statement. The lower court finding for the Education Department declared that Petitioner had neither private cause nor recourse in contract against the U.S. The Fourth Circuit affirmed contrary to the 11th Circuit in Olavarrieta and Petitioner prays the High Court grant *certiorari* to clarify whether a student loan recipient has a private cause of action or may alternatively defend himself against fraud or mistake, in contract or tort, by the Education Department ac-

counting of a loan portfolio.[10] The alternative is seemingly to accept "impaired capacity to manage," or "impossibility of performance," as legislative intent in Moy, Keams, Hudson, L'Ggrke and Jackson.

III. THE FOURTH CIRCUIT *DE JURE* OBSTRUCTS JUSTICE BY NOT PUBLISHING OPINION THAT FAILS TO CONFORM TO LAW OR FACT

Despite the ongoing controversy in the lower courts, the Fourth Circuit cited but one case, the instant one, in support of its tacit affirmation of the lower court ruling, apparently misapplying especially Moy, but, as well, Keams, Hudson, L'Ggrke and arguably Jackson, that there are no enforceable F.R.C.P. Rule 9(b) fraud or contract defenses of any type, kind or color that can be brought by a student declared by the U.S. to be in default in a student loan. Where Petitioner's Relator Statement (Appendix F) satisfies the right to fraud defenses in Moy, Olavarrieta, and even Jackson, the court of first instance herein

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[10] Petitioner prayed for an audit in his first motion for a Special Master in 1987 [Appendix H]; the same audit issue Petitioner responded to in his reply in this case to Defendants answers and counter-claims the Rule 9(b) "mistake" issue being that the U.S. failed to adhere to "Generally Accepted Commercial Lending Practices" in (Windsor U., *supra*, as an affirmative defense in argument against the Education Department counterclaims and is implicit in his Rule 59 motion.

ignores 34 C.F.R. 682.207 and 682.604 violations in summarily dismissing fraud defenses. This inequity goes unjustified ("unpublished") (Appendix A(1) and (2)) and accumulates as abuse of process impacting upon the Judicial Code of Ethics at Canon I and Canon II as **CLEAR AND PRESENT DANGER.**

The doctrine of federal court nonpublication is of equity interest as a matter of U.S. civil and criminal procedural error where Fifth and Fourteenth Amendment abuses are caused by First Amendment breach, evident in here in the silence of the Fourth Circuit when "loan defense" cases are allowed in De Jesus Chavez, Moy and Olavarrieta but denied in Moy, Keams, Hudson and L'Ggrke:

> In the ultimate game of "hide the ball," select groups of court administrators and judges in every state and federal district, protected by rules that cannot be appealed, systematically deny the public full access to more than two-thirds of judicial opinions written by state and federal judges. In short, nothing less than censorship is shaping common law.
>
> At the same time, more than half of the federal circuit courts ... have passed rules that forbid citation of unreported opinions. Moreover, the U.S. Supreme Court refuses to review First Amendment challenges to these rules, and lawyers who violate no-citation rules are subject to court sanctions and professional discipline.
>
> * * * *

> In June 1995, Michigan Supreme Court Justice Michael F. Cavanagh declared that the non-publication of decisions, especially by courts of appeals, "unnecessarily increases the likelihood that significant issues will be buried and subsequently ignored by [the] Court."

Phillip Joy, "Unpublished Opinions Stunt Common Law," *National Law Journal*, January 26, 1996, page 19-202. Pregnant within is whether the instant petition for *certiorari* does substantial justice when judicially-made law based on glaringly false justifications of "legislative intent" fails to enforce codification. Such compounded mistake is a First Amendment "clear and present danger" where Fifth, Sixth and Fourteenth Amendment aspects of a failure to publish a "hide-the-ball" decision militates for *certiorari*.

Reflecting upon "professional discipline," Petitioner cites Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829, 56 L.Ed.2d 1, 98 S.Ct 1535 (1978), as guidance in determining allegations of erroneous conduct of the Virginia-dominated U.S. Circuit seated in Richmond. In Landmark, a newspaper published a report on disciplinary hearings of Virginia judges in the face of proscription by Virginia law that news leaks from such hearings were "unpublishable." Similar to the instant case, Landmark Communications, Inc., found no justice within the Fourth Circuit, which found that the Commonwealth could exceed the First Amendment in protecting the exclusive privacy

of its censured, or about-to-be disciplined, judges. The High Court reviewed the facts to reverse such Virginia Code and Fourth Circuit provisions as unconstitutionally a 'clear and present danger.'

The Eastern District Virginia Bench here reacted to Petitioner's criticism of a Rule 5 mailing postmarked fourteen (14) days *ante* order of entry (Appendix B(4) page 3) by (a) staying on the counterclaims; (b) changing the judge. The Rule 5 error judge, Senior Judge Bryan, was sustained (Appendix A(1) and (2)) in holding that Rule 9(b) fraud was not justiciable in a guaranteed student loan case, reversing the 11th Circuit on Olavarrieta as arguably well as the High Court in Bivens.

The replacement judge published opinion only in transcript *dicta* (Appendix B(1) and (2)), dictating in his Final Order, "as established in open court," (*id.*, B(2)) in otherwise quashing without relevant argument or comment Petitioner's student loan fraud "defenses" based on 34 C.F.R. 682.207 and 682.604 violations, despite De Jesus Chavez. The Fourth Circuit's failure to publish a meaningful opinion on the **contract controversy *vis-a-vis* 682.207 and 682.604 contract duties owed by the U.S., as in De Jesus Chavez, especially as stated with particularity in a private Rule 9(b) complaint,** exceeds First Amendment privacy allowances available to the Commonwealth of Virginia in Landmark Publications.

Moreover, Fourth Circuit silence on the trial court Rule 5 error "Hide-the-ball" mishandling (Appendix B(4) pages 3 and 4) where an official envelope postmarked "August 2, 1996," was mailed to Petitioner at a wrong address containing a dispositive order (Appendix B(4) pages 1 and 2) dated July 15, 1996, that disabled Petitioner's interlocutory appeal, is egregious: Fourth Circuit failure to publish comment on the Rule 5 F.R.C.P. judicial controversy brought by Petitioner itself militates a new trial, as in the Landmark ruling.

If Landmark is consistently applied, Petitioner has here been quashed, *inter alia*, for publicly criticizing a federal judge for record error. This stands, in 'clear and present danger' terms, as a violation of Petitioner's First Amendment rights, as well as his fundamental Fifth and Fourteenth Amendment rights to process.

Further dispositive of the misallocation of government authority by federal courts is the recent Fourth Circuit Supreme Court reversal in Gutierrez de Martinez, et al, v. LaMagno (No.94-167, June 14, 1995). This Fourth Circuit Supreme Court reversal turned on whether a gratuitous, overtly self-serving report made to oblige the U.S.Code, could contain a nonreviewable opinion. The Fourth Circuit found for the agency; the U.S. Department of Justice, which proffered a report written to certify that a tortfeasor was employed by the U.S. Government who, while legally drunk, acted within the "scope of

authority" at the time of the tort, thus excusing the U.S. This egregious gratuity was allowed by the Eastern District of Virginia as nonreviewable and conclusory in quashing the plaintiff tort claim against the United States:

> The argument for unreviewability in such an instance runs up against a mainstay of our system of government. Madison spoke precisely to the point in The Federalist No. 10:
>
> 'No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time . . . .' The Federalist No.10, p.79 (C.Rossitter, ed.1961) (J.Madison).

Gutierrez de Martinez, id, page 10.

Similarly herein, the U.S. motion for summary judgment at its Declaration and Exhibits, allows a report written by a federal employee, one "Mary Windsor," Section II Chief of the Research and Support Branch of the Credit Management and Debt Collection Staff, Region V" (Appendix C) for the Education Department fully knowing about the GAO audit fiasco, therefore was written from an unaudited (following from "unauditable", May 1993 GAO Report in *Readers Digest*, *id.*), database, and thus arguably **excludable as hearsay**: "And part of the collection is to keep [Petitioner] running in the computer .... And so that's part of the administrative costs of doing business in terms of

trying to collect on these defaulted student loans." Appendix B(2) page 6.

The "Declaration" in support of summary judgment contravenes "Generally Accepted Commercial Lending Principles" in Windsor U v. Secretary, HEW (C.A. Cal 1976), 550 F.2d 1203, which precursors the GAO inability to perform an audit upon the Education Department student loan files *(supra)*. The Fourth Circuit proceeds hand-in glove in Goranowski v. U.S. Education Department in hegemony with the U.S. Attorney as in the gratuitously false, self-serving and perjurious "certification of scope of employment" at issue in Gutierrez de Martinez.

The corrupt loan records demonstrated by the GAO as kept on Petitioner by the Education Department are here, as de Martinez, allowed by the Fourth Circuit, as "within ... scope" while ignoring "the allegations in the complaint":[11]

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[11] Gutierrez de Martinez, et al. v. Lamagno, et al., Petition for Writ of Certiorari, page 13. Accordingly,

> Pursuant to Title IV of the Higher Education Act, 20 U.S.C. section 1070 *et seq.*, and the regulations promulgated thereunder, 34 C.F.R. sections 668 et seq., the Secretary of Education has authority to enforce the provisions of the act. See 20 U.S.C. sections 1070(b), 1071, 1082, 1094.

L'Garke, *id*. p.1347. The prevailing judicial interpretation of guaranteed student loan regulations and statutes provide that the Education Secretary is the only available prosecutor of a claim of

> At least equally perplexing, the proposed reading would cast Article III judges in the role of petty functionaries, persons required to enter as a court judgment an executive officer's decision, but stripped of capacity to evaluate independently whether the executive's decision is correct.

Gutierrez de Martinez, *id.*, p.8. Herein, similarly, the Fourth Circuit rubber-stamps the Eastern District of Virginia's rubber-stamping of the U.S. Attorney:

> If Congress made the Attorney General's delegate sole judge, despite the apparent conflict of interest, then Congress correspondingly assigned to the federal court only rubber-stamp work. Upon certification in a case such as this one, the United States would automatically become the defendant and, just as automatically, the case would be dismissed. The key question presented --
>
> > **[The issue is whether [Petitioner] applied for and received loans to attend the 1986 fall session and failed to return to Antioch. This is undisputed, and the responsibility for this failure rests with the plaintiff. [Appendix B(2) page 10, *id, supra.*]**
>
> -- however contestable in fact, would receive no judicial audience. The court could do no more,

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abuse; the administrative law court of the Education Department is the primary adjudicator. These are one and the same. **However, the Education Department has been shown to be a corrupt service** by GAO, run as a Ponzi scam for S&Ls by William O. Bennett during the 1986 period in question.

> and no less, than convert the executive's scarcely disinterested decision into a court judgment. This strange course becomes all the more surreal when one adds to the scene the absence of an obligation on the part of the Attorney General;'s delegate to conduct a fair proceeding, indeed, any proceeding. She need not give the plaintiff an opportunity to speak to the "scope" question, nor even notice that she is considering the question. Nor need she give any explanation for her action.

Gutierrez de Martinez, *id. Vide:*

> [I]t is undisputed that plaintiff applied for and received funds to attend the 1986 Fall Session at Antioch and failed to return to school. Plaintiff's failure to enroll in the fall session rests squarely on his shoulders and his reliance on a lack of consideration defense is misplaced.

Appendix B(3) page 2.

Petitioner submits that an unconstitutionally 'clear and present danger' exists twicefold when the Fourth Circuit unquestioningly rubber-stamps questionable decisions of law on the basis of corrupt facts instantly, as in Guttierez de Martinez, when, within discretion, instant fact defenses are allowed (albeit "on other grounds" by an adjacent U.S. Circuit in Jackson; whereas from Moy, Olavarrieta and De Jesus Chavez, a failure to overturn or to publish justification against them amounts to moot censure, local prejudice, and a 'clear and present danger,' as in Landmark.

CONCLUSION

The law surrounding student loan default is in the disarray one would expect from an unauditable governmental "oversight." As consumer safeguards have been legislatively gutted respecting student loan transactions, first by removing Truth in Lending Act application, and then the six-year statutory limitation on collections of a debt to the U.S., student loan contractees have systematically been treated as defenseless indenturees by federal courts despite student borrowers who prevailed by offering loan defenses, as in Olavarrieta, De Jesus Chavez and Moy, by demonstrating fraud alleged in the administration of guaranteed student loans. Federal courts utilize Moy, Keams, Hudson, L'Ggrke, *etc.*, as unappealable federal precedent in splitting rulings on the above "loan defense" cases, leaving ambiguity whether violation of a federal regulation governing guaranteed student loans constitute a private cause of action in contract or tort. Substantially the issues do not reach U.S. appellate jurisdiction because the economic inability of the student borrower obviates the legal fees necessary to mount an appeal since students generally lack standing to plead *in forma pauperis*.

Therefore, with fees fully paid, we petition under 'Clear and Present Danger' First Amendment doctrine, that a failure to publish a Fourth Circuit denial of law upheld by several U.S.

district courts, including the 11th Circuit, obstructs justice and violates Fifth and Fourteenth Amendment rights to due process.

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

RICHARD H. GORANOWSKI, PETITIONER

Date: June 4, 1996

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
January 24, 1996

No. 94-2527

Goranowski v. US Dept Education

MANDATE

The judgment of this Court dated 11/15/95 takes effect today.

BERT M. MONTAGUE
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
January 16, 1996

No. 94-2527
CA-94-503-A

RICHARD HENRY GORANOWSKI

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF EDUCATION

Defendant - Appellee

and

HIGHER EDUCATION ASSISTANCE FUND; WACHOVIA FINANCIAL SERVICES; ANTIOCH UNIVERSITY

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 94-2527

RICHARD HENRY GORANOWSKI, Plaintiff - Appellant

versus

UNITED STATES DEPARTMENT OF EDUCATION, Defendant - Appellee

and

HIGHER EDUCATION ASSISTANCE FUND, WACHOVIA FINANCIAL SERVICES; ANTIOCH UNIVERSITY, Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Chief District Judge; Albert V. Bryan, Jr., Senior District Judge (CA-94-503-A)

Submitted: August 8, 1995 Decided: November 15, 1995

Before NIEMEYER and MOTZ, Circuit Judges, and PHILLIPS, Senior Circuit Judge

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Affirmed by unpublished per curiam opinion

Richard Henry Goranowski, Appellant Pro Se. Paula Pugh Newett, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

Appellant appeals from the district court's orders granting summary judgment in favor of the Department of Education on its counterclaim for Appellant's defaulted student loans and denying his motion for reconsideration pursuant to Fed. R. Civ. P. 95(e). Appellant also appeals the order dismissing his amended complaint and denying his motions pursuant to Fed. R. Civ. P. 55 and Fed. R. Civ. P. 11. We have reviewed the record and the district court's opinion and orders and find no reversible error. Accordingly, we affirm on the reasoning of the district court. Goranowski v. United States Dep't of Education, No. CA-94-503-A (E.D. Va. July 15, Sept. 2, and Oct.17, 1994). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD HENRY GORANOWSKI	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 94-503-A
UNITED STATES	)	
DEPARTMENT OF EDUCATION,	)	

Defendant.

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) that the Defendant's Motion to Amend Judgment is DENIED;

(2) Should Plaintiff wish to appeal this ruling, he must file a written notice of appeal with the Clerk of this Court within thirty days of the date of entry of this Order.

(3) that the Clerk shall send certified copies of this Order to counsel and to the Plaintiff, pro se.

/s/ James C. Cacheris
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
October 14, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

RICHARD HENRY GORANOWSKI	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 94-503-A
UNITED STATES	)	
DEPARTMENT OF EDUCATION,	)	

Defendant.

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) that the Defendant's Motion for Summary Judgment is GRANTED. Judgment is entered in favor of the Defendant, United States Department of Education, and against the Plaintiff, Richard H. Goranowski in the amount of SIXTEEN THOUSAND TWO HUNDRED SIXTY THREE DOLLARS and 33/100 ($16,263.33), plus interest.

(2) Should the Plaintiff wish to appeal, he must file his written notice of appeal with the Clerk of this Court within thirty days of the entry of this order.

(3) that the Clerk shall forward copies of this Order to all counsel of record.

AND THIS ORDER IS FINAL.

/s/ James C. Cacheris
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
September 2, 1994

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

RICHARD HENRY GORANOWSKI	)	
	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
	)	NO. 94-503-A
	)	
UNITED STATES	)	
DEPARTMENT OF EDUCATION,	)	

Defendant.

ORDER

The plaintiff, apparently in default on various loans he obtained while a student and apparently feeling that the best defense is a good offense, originally brought this case as a qui tam action against the United States Department of Education and three other defendants. Failing in that endeavor, the plaintiff filed an amended complaint asserting a cause of action under Rule 9(b) of the Federal Rules of Civil Procedure and 20 U.S.C. &1078-9, in which he seeks a determination that his debt to the Department of Education is the product of fraud or mistake and a declaration that he is eligible to participate in the Higher Education Act of 1965, as amended, 20 U.S. 1001, et seq.

The United States has filed a suggestion of dismissal with respect to the Department of Education, which has filed a

counterclaim in which it seeks to recover on the loans. The court finds that the suggestion of dismissal is well-taken. Rule 9(b) does not create a private right of action, nor does 20 U.S.C. [section 1078-9. To the extent that the plaintiff challenges the amounts claimed by the Department of Education, this may be raised as a defense to the counterclaim.

The plaintiff seeks a default judgment against the Department of Education. The court finds that both the answer and the counterclaim were timely and that a default judgment is not warranted.

Nor will the court grant a motion to strike defendant's answer and counterclaim, which was filed by the plaintiff today, for the failure to mail the answer and counterclaim to the plaintiff's proper address.

For these reasons, the suggestion of dismissal of the United States will be granted and the plaintiff's motion for default judgment will be denied. The plaintiff's amended complaint is dismissed and the case will proceed with respect to the counterclaim. And it is so ordered.

/s/ Albert V. Bryan, Jr.
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 15, 1994

No._____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

_____

RICHARD HENRY GORANOWSKI -- PETITIONER

VS.

UNITED STATES EDUCATION DEPARTMENT

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Richard Henry Goranowski
5440 Cass Avenue, Suite 710
Detroit, Michigan 48202
(313) 833-5068